33

FILED

AUG 30 1945

No. 343

OCTOBER TERM, 1945

THOMAS W. NEALON

PETITIONER,

v.

HARRY W. HILL, AS RECEIVER OF INTERMOUNTAIN BUILDING & LOAN ASSOCIATION, A CORPORATION,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF

TOPICAL INDEX

CITATIONS

Cases—Continued

Statutes:

Rules:

Text:

In the Supreme Court of the United States

THOMAS W. NEALON

PETITIONER,

v.

HARRY W. HILL, AS RECEIVER OF INTERMOUNTAIN BUILDING & LOAN ASSOCIATION, A CORPORATION,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner respectfully prays for a writ of certiorari to review the decision and judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered June 29, 1945 (R. 704) dismissing an appeal from two orders of the United States District Court for the District of Arizona, sitting at Phoenix, entered on December 7, 1942 (R. 243) and on November 29, 1944. (R. 657).

The order entered December 7, 1942, awarded

to petitioner fees and expenses incurred as solicitor for creditors of Intermountain Building & Loan Association, wherein creditors of that association, individually, and as a class, instituted a suit in the United States District Court for the District of Arizona for the appointment of a receiver of the assets of that association. (R. 2).

Petitioner filed a petition on March 31, 1944 (R. 599) to review and rehear the order of December 7, 1942. That petition was dismissed by the district court November 29, 1944. (R. 657). The trial judge did not deliver an opinion on the order of December 7, 1942, nor on the order of November 29, 1944. On December 7, 1944 petitioner appealed to the Circuit Court of Appeals from the order of December 7, 1942 and also from the order of November 29, 1944. (R. 666).

OPINION OF THE CIRCUIT COURT OF APPEALS

The Circuit Court of Appeals rendered an opinion on June 29, 1945, which is not as yet reported but is included in the Transcript of Record, beginning at page 704.

The Circuit Court of Appeals granted the receiver's motion to dismiss the appeal (R. 690) because, as the opinion recites, (1) the appeal was not taken in time from the order of December 7, 1942, (2) appellant (petitioner) waived his right to appeal from that order by accepting the benefits of the order[1], (3) the order of November 29, 1944 was not appealable. (R. 706).

---

[1]The opinion discloses that this ground of motion to dismiss was not considered by the Circuit Court of Appeals.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

This court has jurisdiction to review by certiorari the decision and judgment of the Circuit Court of Appeals. § 240 (a) of the Judicial Code, as amended, 28 USCA, § 347 (a).[2]

Petition for rehearing was denied by the Circuit Court of Appeals on July 23, 1945. (R. 708). On that day, the Circuit Court of Appeals stayed the mandate until August 31, 1945, conditioned upon the filing of this petition within that time. (R. 708, 709).

CONSTITUTION, STATUTES AND RULES INVOLVED

No provision of the Federal Constitution is involved, nor are statutes except as they are incidental to matters which are involved. Petitioner believes important questions of practice are presented by a construction given some of the Rules of Civil Procedure by the Circuit Court of Appeals which petitioner thinks is wrong.

SUMMARY STATEMENT OF MATTERS INVOLVED

I

Petitioner rendered extensive services as solicitor for creditors of Intermountain Building & Loan Association in a creditors' class suit which eventuated in the appointment of a receiver for that association by the United States District Court for the District of Arizona. (R. 400). On October 15, 1937, petitioner filed a petition in the district court for solicitor's fees and expenses incurred in the preparation and trial of the credit-

[2]This section is printed in the appendix at page 33.

ors' suit. (R. 108-162). The extent of petitioner's services is indicated by several decisions of the Circuit Court of Appeals for the Ninth Circuit.[3]

II

The petition filed October 15, 1937, requested compensation for services rendered and expenses incurred in the creditors' suit. (R. 160, 161, 162). After the appointment of the first receiver petitioner served as his attorney under appointment of the district court. (R. 378). The order of December 7, 1942, recited that it was a final award of compensation for services rendered by petitioner to the petitioning creditors in the class suit and also to the receiver. (R. 243-248).

The petition filed October 15, 1937 (R. 108-164) came on for hearing December 20, 1937. (R. 245). After a lapse of five years, the order of December 7, 1942 followed. Petitioner did not then appeal from that order, but on March 31, 1944 he filed a petition to rehear it. (R. 599). The district court dismissed the petition with prejudice by the order entered November 29, 1944. (R. 657).

The petition to rehear the order of December 7,

---

[3] *Intermountain Building & Loan Association, et al* v. *Gallegos, et al*, 9 Cir., 78 Fed. 2d 972; cert. den. 296 U. S. 639, 80 L. Ed. 454, 56 S. Ct. 172.

Guadalupe R. Gallegos, et al v. *Lloyd R. Smith, Corporation Commissioner*, 9 Cir., 111 Fed. 2d 805; cert. den. 311 U. S. 668, 85 L. Ed. 429, 61 S. Ct. 27.

Julius G. Brashear v. *Intermountain Building & Loan Association, et al*, 9 Cir., 109 Fed. 2d 857; cert. den. 311 U. S. 655, 85 L. Ed. 419, 61 S. Ct. 9.

Monaghan v. *Hill, as Receiver*, 9 Cir., 140 Fed. 2d 31.

1942, was filed beyond the 10 day period prescribed by Rule 59 (b) of the Rules of Civil Procedure.[4]

On December 7, 1944, petitioner appealed from the order of December 7, 1942, and also from the order of November 29, 1944. (R. 666). The appeal was taken more than three months after the order of December 7, 1942 was entered, § 230, Title 28 USCA[5], but within three months after the order of November 29, 1944 was entered.

The district court entertained, considered and then dismissed the petition filed March 31, 1944 (R. 599) to rehear the order of December 7, 1942 (R. 243) as appears from the following proceedings had in the district court:

(a) On March 31, 1944, petitioner filed the petition in the district court to review and rehear the order of December 7, 1942. (R. 599).

(b) The respondent, as receiver, on May 8, 1944, filed an answer to the petition filed March 31, 1944. (R. 632).

(c) The district court, after the petition and answer were filed, ordered a pre-trial conference, and by an order entered June 7, 1944, adopted the issues formulated by respective counsel, thus entertaining the petition and answer and the issues as formulated. (R. 643-651).[6]

---

[4]Rule 59 is printed in the appendix at page 33.

[5]This section is printed in the appendix at pages 33, 34.

[6]Pre-trial conference is authorized by Rule 16 of Rules of Civil Procedure. The rule is printed in the appendix at page 34.

(d) Petitioner on November 21, 1944, moved to submit for decision the petition filed by him March 31, 1944. (R. 651).

(e) Respective counsel on November 22, 1944, stipulated to submit the petition for consideration and decision by the trial court on briefs which had been theretofore filed (R. 652) and the trial court so ordered. (R. 653).

(f) Respondent on November 22, 1944, filed a motion for an order to deny and dismiss the petition filed March 31, 1944. (R. 653).

(g) After considering the foregoing proceedings, and the issues raised by them, the trial court on November 29, 1944, entered an order denying the petition filed March 31, 1944 and dismissed it with prejudice. (R. 657).

Petitioner asserted that the trial court, by entertaining, considering and dismissing the petition filed March 31, 1944 to rehear the order entered December 7, 1942, opened that order for review by appeal to the Circuit Court of Appeals under the rule of the following decisions:

Wayne United Gas Co. v. *Owens-Illinois Co.*, 300 U. S. 131, 81 L. Ed. 557, 57 S. Ct. 382.

Bowman v. *Lopereno*, 311 U. S. 262, 85 L. Ed. 177, 61 S. Ct. 201.

Pfister v. *Northern Illinois Finance Co.*, 317 U. S. 144, 87 L. Ed. 146, 63 S. Ct. 133.

The Circuit Court of Appeals concluded that since those decisions related only to proceedings in bankruptcy, they are inapplicable to this receivership proceeding in equity. (R. 706).

III

Rule 60 (b) of the Rules of Civil Procedure, 28 USCA, following § 723 (c), provides as follows:

> (b) MISTAKE; INADVERTENCE; SURPRISE; EXCUSABLE NEGLECT. On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgement, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not effect the finality of a judgment or suspend its operation. *This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order or proceeding,* or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, U. S. C., Title 28, § 118, a judgment obtained against a defendant not actually personally notified. (Italics supplied).

Petitioner also invoked the italicized exception contained in the foregoing rule for authority of the district court to review the order of December 7, 1942. (R. 243). The Circuit Court of Appeals apparently concluded otherwise, since its opinion does not refer to the rule.

IV

The Circuit Court of Appeals, by its opinion dismissing the appeal, thought the petition of March 31, 1944, filed after the expiration of the term, came too late. (R. 706).

Rule 6 (c) of the Rules of Civil Procedure provides that the expiration of the term of the district court does not affect or limit the power of that court to entertain the petition filed March 31, 1944[1]. The Circuit Court of Appeals apparently concluded that the rule had no application to the proceedings had in the district court.

V

In a companion case, the Circuit Court of Appeals held that the order entered in that case on December 7, 1942 was final for the purpose of appeal. *Monaghan* v *Hill,* 9 Cir., 140 Fed. 2d 31. The order appealed from in that case likewise awarded solicitor's fees in this receivership proceedings. (R. 239). The Circuit Court of Appeals, by its decision in that case, had no occasion to decide, and did not decide, that the order of December 7, 1942, affecting petitioner, although appealable, could not be subsequently reviewed by the district court

---

[1]Rule 6 (c) of the Rules of Civil Procedure, 28 USCA, following § 723 (c), provides:

> *Unaffected By Expiration of Term.* The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of court. The expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it.

after the time for appeal had expired but before the final decree in the receivership proceedings was entered.

SPECIFICATION OF ERRORS

1. The United States Circuit Court of Appeals for the Ninth Circuit erred in dismissing petitioner's appeal from the order of the district court entered December 7, 1942 (R. 243), and from the order of the district court entered November 29, 1944 (R. 657) which denied and dismissed the petition filed March 31, 1944 (R. 599) to rehear the order of December 7, 1942, for the reason that the district court entertained, considered and then dismissed the petition filed March 31, 1944 to rehear the order of December 7, 1942, thus placing both orders under review by the Circuit Court of Appeals for error asserted by the appeal taken from them on December 7, 1944. (R. 666).

2. The United States Circuit Court of Appeals for the Ninth Circuit erred in dismissing the appeal because the term of the district court had expired at the time the petition of March 31, 1944 was filed to rehear the order of December 7, 1942, for the reason that the filing of the petition on March 31, 1944 to rehear the order of December 7, 1942, and the entertainment of that petition by the district court, was not affected or limited by the term of court in this proceeding in equity not closed, particularly in view of Rule 6 (c) of the Rules of Civil Procedure which became effective before the order of December 7, 1942 was entered.

3. The United States Circuit Court of Appeals

for the Ninth Circuit erred in dismissing the appeal from the orders of the district court of December 7, 1942, and November 29, 1944, for the reason that the district court was empowered in this proceeding in equity, under subdivision (1) contained in the last sentence of Rule 60 (b) of the Rules of Civil Procedure, to rehear the order of December 7, 1942, and the district court having exercised that power, the Circuit Court of Appeals was then empowered and required to entertain the appeal to review the orders of December 7, 1942 and November 29, 1944 for error asserted.

4. The United States Circuit Court of Appeals for the Ninth Circuit erred in dismissing the appeal from the orders of December 7, 1942 and November 29, 1944 because not taken within the time allowed to appeal from the order of December 7, 1942, for the reason that although that order was subject to review by timely appeal, the failure of petitioner to invoke that remedy did not preclude him, while this proceedings in equity was not closed, from petitioning the district court to rehear the order of December 7, 1942, as petitioner did by the petition filed March 31, 1944.

QUESTION PRESENTED

Whether the time was enlarged to appeal from the order entered by the district court on December 7, 1942, awarding solicitor's fees to petitioner, by that court entertaining and dismissing the petition to rehear that order filed March 31, 1944, which was filed after the expiration of the term within which the order of December 7, 1942 was entered,

and after the time provided for filing the petition to rehear the order, and after the time to appeal from the order, but filed in a receivership proceedings in equity still open.

REASONS RELIED UPON FOR THE ISSUANCE OF THE WRIT

Petitioner believes that the Circuit Court of Appeals, by dismissing petitioner's appeal, has erroneously decided an important question of federal practice, which, in its application to a receivership proceedings in equity not closed, has not been, but should be, settled by this court; and has decided a question of federal practice pertaining to a receivership proceeding in equity not closed in a way probably in conflict with applicable decisions of this court.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and to send to this Honorable Court for its review and determination, on a day certain to be named therein, the full and complete transcript of record and all the proceedings entitled as in the caption of this petition, and catalogued in the lower court as No. 10961, and that, after review, the decision and judgment of the United States Circuit Court of Appeals for the Ninth Circuit, made and entered in this cause, may be reversed by this Honorable Court, and that your petitioner may have such

other and further relief in the premises as may seem meet and just.

And your petitioner will ever pray.

LESLIE C. HARDY,
Counsel for Petitioner

THOMAS W. NEALON
Pro se

CERTIFICATE OF COUNSEL

The undersigned counsel for petitioner herein, who is a member of the bar of this court, does hereby certify that the foregoing petition for writ of certiorari in his opinion is well founded and meritorius, and does further certify that it is not interposed and filed for the purpose of delay.

LESLIE C. HARDY,
Counsel for Petitioner

In the Supreme Court of the United States

OCTOBER TERM, 1945

THOMAS W. NEALON,

PETITIONER,

v.

HARRY W. HILL, AS RECEIVER OF INTERMOUNTAIN BUILDING & LOAN ASSOCIATION, A CORPORATION,

RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioner and his counsel appreciate that certiorari is not granted as a matter of right, but is granted only when there are special and important reasons therefor, and then as limited by subdivision 5 of Rule 38 of this Honorable Court.

Petitioner and his counsel believe that the Circuit Court of Appeals has erroneously decided an important question of federal practice, which, in its application to the question involved in this administrative proceedings in equity not closed, has not been, but should be, settled by this court; and furthermore that the Circuit Court of Appeals has decided an important question of federal practice pertaining to such proceedings in a way probably in conflict with applicable decisions of this court.

This court does grant certiorari to settle questions of practice presented under the Rules of Civil Procedure.[8]

The opinion of the Circuit Court of Appeals discloses that the receiver, as appellee in that court, moved to dismiss the appeals, in part, because petitioner waived his right to appeal from the order of December 7, 1942 by accepting the benefits of the order.

Since the Circuit Court of Appeals disposed of the appeals upon jurisdictional questions only, that court thought the question of waiver arising from accepting the benefits of the order of December 7, 1942, need not be considered. (R. 706).

If our understanding is correct, the decision of the Circuit Court of Appeals by foregoing that question removes the necessity of discussing it upon this petition for certiorari. The question did not enter into the judgment of the Circuit Court of Appeals dismissing the appeals.

Assuming, but not conceding, that petitioner will not succeed in contesting the issue of waiver arising from accepting payment under the order of December 7, 1942, nevertheless, we submit, the succeeding pages will disclose that petitioner, at least, is entitled to be heard upon that issue.

In the event this petition for certiorari is grant-

---

[8] *Leishman* v. *Associate Wholesale Electric Co.*, 318 U. S. 203, 87 L. Ed. 714, 63 S. Ct. 543.
Zimmern v. *United States*, 298 U. S. 167, 80 L. Ed. 1118, 56 S. Ct. 706.

ed, and this Honorable Court concludes that the question of waiver arising from accepting the benefits of the order should be considered and disposed of, then petitioner respectfully requests that an opportunity be accorded him to present his position on that question by supplemental brief.

BRIEF SUMMARY OF FACTS

Petitioner rendered extensive services for petitioning creditors in a class suit which eventuated in the appointment of a receiver by the district court for Intermountain Building and Loan Association, an Utah corporation, which operated in several western states. The extent of those services is portrayed by the petition filed by petitioner on October 15, 1937 for solicitor's fees and expenses incurred in the preparation and trial of the creditors' suit. (R. 108).

Upon the successful termination of the creditors' suit, petitioner was appointed counsel for the first receiver by the district court. (R. 378). The petition filed by petitioner on October 15, 1937 was confined to services rendered in the creditors' suit. Petitioner did not then request compensation for services rendered by him to the receiver and in the ancillary receiverships. (R. 160, 161).

Nonetheless, the order entered by the trial court on December 7, 1942, purported to be a final order compensating petitioner for services rendered not only in the creditors' suit but also in the receivership proceedings. (R. 243-248). The district court by the order entered December 7, 1942, awarded

petitioner $12,500.00, less $7,500.00 which had already been paid to him. (R. 243).

An award in the same amount in this proceeding was also made to Elizabeth G. Monaghan for similar services. (R. 239). She appealed to the Circuit Court of Appeals from the order making the award to her and that court reversed the district court and fixed her compensation in an amount not less than $50,000.

Monaghan v. *Hill,* 9 Cir., 140 Fed. 2d 31.

The opinion in that case discloses that experienced attorneys fixed the value of petitioner's compensation in the creditors' suit alone at not less than $100,000. The opinion further discloses that as a result of the efforts of petitioner and his co-solicitor, gross assets of Intermountain Building and Loan Association valued at more than $2,000,000 passed into the hands of the receiver, and that almost 3000 creditors of the association elected to avail themselves of the benefits of the suit. In appraising the value of these services, the Circuit Court of Appeals said:

> Although the efforts of the two attorneys were vigorously resisted in every way possible, the results of the litigation were highly satisfactory. A receiver was appointed by the federal District Court to handle the assets of the corporation. Gross assets valued at more than two million dollars passed into the hands of the receiver; probably all would have been dissipated by the Association had it not been for the work of the two attorneys mentioned. Almost three thousand creditors

> of the Association elected to avail themselves of the benefits of the suit. (*Monaghan* v. *Hill,* 140 Fed. 2d. 32, 33).

Petitioner did not appeal from the order of December 7, 1942, awarding compensation to him. He did file a petition on March 31, 1944 to rehear that order. (R. 599). Petitioner then, for the first time, requested compensation for services he had rendered to the receiver first appointed and compensation for services he had rendered in the ancillary receivership proceedings, which extended to California, Idaho, Oregon, Utah and Wyoming. (R. 601). The petition filed March 31, 1944 to review the order of December 7, 1942 was supported by the affidavit of petitioner wherein he recited the extent of the services rendered by him to the receiver, and in the ancillary receivership. (R. 620-631). Petitioner estimated the reasonable value of his services in that behalf at $40,500. (R. 631).

The petition filed October 15, 1937 for solicitor's fees in the creditors' suit was not traversed. Testimony of the several attorneys as to the value of those services was uncontradicted. Petitioner's affidavit (R. 620) which accompanied the petition filed March 31, 1944, to rehear the order of December 7, 1942, and for compensation for services performed to the receiver, and in the ancillary receiverships, was not controverted save as the petition was controverted by the answer of the receiver. (R. 632).

The order of December 7, 1942, recited that it constituted payment for services rendered by petitioner to the receiver. (R. 247). Although petitioner did not then request the district court for com-

pensation for services rendered to the receiver, the order of December 7, 1942, by purported finality, deprived him of the opportunity to be heard on the value of those services. Petitioner's claim of compensation for those services was first presented to the court by the petition of March 31, 1944 (R. 599) which the district court entertained and denied with prejudice. (R. 657).

SUMMARY OF THE ARGUMENT

Notwithstanding petitioner did not appeal in time from the order entered December 7, 1942, which purported to be a final order awarding petitioner solicitor's fees for services performed in the creditors' suit, and also for services performed to the receiver, nevertheless the district court, by entertaining, considering and disposing of the petition filed out of time on March 31, 1944 to rehear the order of December 7, 1942, opened that order for appeal to the Circuit Court of Appeals.

(Specification of Error No. 1, page 9, supra.)

The Circuit Court of Appeals has decided that the appeal from the order of December 7, 1942 was too late. The appeal was taken from that order on December 7, 1944. (R. 666). The trial court entertained the petition filed March 31, 1944 (R. 599) to rehear the order of December 7, 1942. That petition, after entertainment, was dismissed by the district court November 29, 1944 with prejudice. (R. 657). Obviously the petition could not have been dismissed with prejudice unless the trial judge had entertained and considered it. The trial judge ordered a pre-trial conference upon the pe-

tition and answer filed by the receiver which resulted in the formulation of the issues then presented, and those issues as formulated were adopted by an order of the district court. (R. 643-651). Thus in every essential detail there was a trial of the issues.*

The proceedings had in the district court on the petition of March 31, 1944 enlarged the time to appeal to the Circuit Court of Appeals from the order of December 7, 1942. Consequently, petitioner appealed on December 7, 1944 to the Circuit Court of Appeals both from the order of December 7, 1942, and from the order of November 29, 1944 dismissing the petition filed March 31, 1944 to rehear the order of December 7, 1942. (R. 666).

Petitioner asserted in the Circuit Court of Appeals that the district court, by entertaining, considering and dismissing with prejudice the petition filed March 31, 1944 to rehear the order entered December 7, 1942, enlarged the time to appeal from that order to the Circuit Court of Appeals under the rule of the following decisions of this court:

> *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 300 U. S. 131, 81 L. Ed. 557, 57 S. Ct. 382.
>
> *Bowman v. Loperено,* 311 U. S. 262, 85 L. *Ed.* 177, 61 S. Ct. 201.
>
> *Pfister* v. *Northern Illinois Finance Co.*, 317 U. S. 144, 87 L. Ed. 146, 63 S. Ct. 133.

---

*The proceedings had in the district court on the petition filed March 31, 1944 are set forth in sequence at pages 5 and 6, supra.

The Circuit Court of Appeals, by its opinion, concluded that those decisions apply only to bankruptcy proceedings and are not applicable to this administrative proceedings in equity. (R. 706). The Court of Appeals for the District of Columbia and the Circuit Court of Appeals for the First Circuit came to similar conclusions.[10]

It is true that *Wayne United Gas Co.* v *Owens-Illinois Glass Co., Bowman* v. *Lopereno,* and *Pfister* v. *Northern Illinois Finance Co.,* cited above, treat with bankruptcy proceedings. They hold that a petition to rehear a final order in bankruptcy, although filed out of time, if entertained, reopened the order for appeal and that the time for appeal begins to run from the date of the entry of the order disposing of the petition for rehearing. The rule of decision announced in those cases is not peculiar to bankruptcy, but, on the contrary, is a rule of equity which this court applied to bankruptcy proceedings.

For illustration, in *Wayne United Gas Co.* v *Owens-Illinois Glass Co.,* it appears that in a bankruptcy proceedings a petition for reorganization was dismissed March 2nd. On April 24th petitioner presented a petition to the district court praying for vacation of the order of March 2nd and for a rehearing. On May 12th the district court set aside

---

[10]*Safeway Stores, Inc.* v. *Coe, Commissioner,* 136 Fed. 2d 771; *Jusino* v. *Morales & Tio,* 139 Fed. 2d 946. In the Jusino case the court thought the matter was not free from doubt but followed the rule in the Safeway Stores case. In the Safeway Stores case, Miller J. sharply dissented by distinguishing between motions for new trial and motions for rehearing.

the order of March 2nd, granted a rehearing and fixed May 22nd for a hearing of all questions. On May 22nd petitioner presented a second petition for reorganization. On May 28th the district court dismissed the petitions. On June 11th petitioner applied for appeal which was granted. The Circuit Court of Appeals dismissed the appeal as being out of time. This court reversed. In addressing itself to the power of a district court to entertain a petition for rehearing in equity, filed out of time, as tolling the time for appeal, this court (300 U. S. 136-137) said:

> "A court of equity may grant a rehearing, and vacate, alter, or amend its decree, after an appeal has been perfected and after the time for appeal has expired, but not after the expiration of the term at which the decree was entered. It is true the bankruptcy court applies the doctrines of equity, but the fact that such a court has no terms, and sits continuously, renders inapplicable, the rules with respect to the want of power in a court of equity to vacate a decree after the term at which it was entered has ended. * * * But we think the court has the power, for good reason, to revise its judgments upon seasonable application and before rights have vested on the faith of its action. Courts of law and equity have such power, limited by the expiration of the term at which the judgment or decree was entered and not by the period allowed for appeal or by the fact that an appeal has been perfected. There is no controlling reason for denying a similar power to a court of bankruptcy or for limiting its exercise to the period allowed for appeal. The granting of a rehearing is within

> the court's sound discretion, and a refusal to entertain a motion therefor, or the refusal of the motion, if entertained, is not the subject of appeal. A defeated party who applies for a rehearing and does not appeal from the judgment or decree within the time limited for so doing, takes the risk that he may lose his right of appeal, as the application for rehearing, if the court refuse to entertain it, does not extend the time for appeal. Where it appears that a rehearing has been granted only for that purpose the appeal must be dismissed. * * *"

Except as to terms, the situation in this equity proceedings is exactly the same as it was in the foregoing bankruptcy proceedings. Obviously the rehearing of the order of December 7, 1942, was not entertained for the purpose of appeal. The petition to rehear that order (R. 599) in a forthright way pointed out the claimed errors of the order, as the petition will reveal. The petition was supported by the affidavit of petitioner (R. 620) which in addition substantiated petitioner's claim of compensation to the receiver and in the ancillary receiverships which he had not theretofore claimed. Respondent, as receiver, answered the petition *in extenso*. (R. 632). These were followed by pretrial conference (R. 643) and decision unfavorable to petitioner. (R. 653). In every respect it appears that the proceedings were not simulated and no suggestion has been made by anyone that they were.

So, we revert to the Wayne case (300 U. S. 137) and find in the decision this significant holding:

> "* * * the rule which governs the case is that the bankruptcy court, in the exercise of a sound discretion, if no intervening

> rights will be prejudiced by its action, may grant a rehearing upon application diligently made and rehear the case upon the merits; *and even though it reaffirm its former action and refuse to enter a decree different from the original one,* the order entered upon rehearing is appealable and the time for appeal runs from its entry." (Italics supplied).

In *Bowman* v. *Lopereno,* 311 U. S. 262, 85 L. Ed. 177, 61 S. Ct. 201, above cited, it is said:

> " * * * The filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or if denied by the trial court, cannot operate to extend the time for appeal. But where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof."

It is difficult to reconcile the decision of the Circuit Court of Appeals and the foregoing decisions of this court. The fact is the rule there announced by this court is a rule of equity. It may only be distinguished by the assertion that courts of bankruptcy are courts without terms, whereas courts of equity are courts with terms, and that consequently since the term had expired, the petition of March 31, 1944 to review the order of December 7, 1942 came too late.

But since the adoption of the Rules of Civil Procedure, effective September 16, 1938, the inhi-

bition of terms of court in their application to administrative proceedings in equity, as here, are removed as we shall seek to show by the next subdivision of this brief.

II

In view of Rule 6 (c) of the Rules of Civil Procedure, the expiration of the term of court in no way affects the power of a district court to do any act or take any proceeding in a civil action which is pending before it.

(Specifications of Error No. 2, page 9, supra.)

Rule 6 (c) of the Rules of Civil Procedure[11] was designed to eliminate the difficulties caused by the expiration of terms of court.[12] The taking of a proceeding pending before the district court is not now affected or limited by the expiration of terms of court. Rehearing of orders in an administrative proceeding in equity not closed are not now affected or limited by the expiration of the term as was the case under the former equity practice. Thus receivership proceedings in equity, like bankruptcy proceedings, are not now affected or limited by terms of court. Accordingly, rehearing of orders in receivership proceedings in equity stands like rehearing of orders in bankruptcy proceedings.

---

[11]Rule 6 (c): UNAFFECTED BY EXPIRATION OF TERM. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of court. The expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it.

[12]Notes of Advisory Committee, Title 28 USCA, Rule 6, following § 723 (c).

Rule 59 (b) of the Rules of Civil Procedure provides that a motion for new trial shall be served not later than 10 days after the entry of judgment.[13] Subdivision (a) (2) of Rule 59 provides that a new trial may be granted in an action tried without a jury for any of the reasons for which rehearings have heretofore been granted in suits in equity. The notes of the advisory committee state that this rule represents an amalgamation of the petition for rehearing of Equity Rule 69 and the motion for a new trial of Title 28 USCA, Rule 59, following § 723 (c).

Equity Rule 69 provided that no rehearing could be granted after the term at which the final decree of the court was entered and recorded.[14] But terms of court are now anachronistic.

> *Sprague* v. *Ticonic National Bank,* 307 U. S. 161, 83 L. Ed. 1184, 59 S. Ct. 777.

Accordingly, since the rule of decision in *Wayne United Gas Co.* v. *Owens-Illinois Glass Co., Bowman* v. *Lopereno, and Pfister* v. *Northern Illinois Finance Co.,* supra, is drawn from equity, then a court of equity may now grant a rehearing and vacate, alter or amend its order or decree after the term has expired, providing no intervening or adverse right has vested on the faith of the order or decree. In view of the nature of the order here no such right has vested or could vest. No reason is

---

[13]Rule 59 is printed in the appendix at pages 35, 36.

[14]Equity Rule 69 is printed in the appendix at page 36. The words "the final decree" appearing in the rule apparently mean the last decree which effectively closes the suit, not interim decrees although *pro tanto* final.

perceived why that order could not have been reheard by the district court, as it was reheard by that court, and having been reheard, the order was opened for review by the Circuit Court of Appeals for the errors asserted in that court.

The inequity of the order of December 7, 1942 was directly drawn in question by the petition filed March 31, 1944 to rehear it. (R. 599). The order of November 29, 1944 (R. 657) which dismissed the petition to review the order of December 7, 1942, was directly drawn in question by the appeals to the Circuit Court of Appeals, as was the order of December 7, 1942. Consequently the dismissal of the appeals by the Circuit Court of Appeals because the petition of March 31, 1944 to rehear the order of December 7, 1942 was filed after expiration of term is wrong, measured by Rule 6 (c) of the Rules of Civil Proceedure when that rule is integrated with the decisions of this court heretofore cited.

III

Rule 60 (b) of the Rules of Civil Procedure authorized the district court to relieve petitioner from the error of the order of December 7, 1942.

(Specification of Error No. 3, pps. 9, 10, supra.)

Rule 60 of the Rules of Civil Procedure is devised to relieve parties, under the circumstances therein provided, from judgments and orders.[15] The rule authorizes corrections of clerical mistakes in judgments and orders, or by relieving a party to

[15]Rule 60 is printed in the appendix at page 37. It is also printed at page 7, supra.

a judgment, order or proceeding from mistake, inadvertentance, surprise or excusable neglect, upon motion made not exceeding six months after the judgment, order or proceeding was taken. By exception (b) (1) of the rule the power of the court "to entertain an action to relieve a party from a judgment, order or proceeding" is not limited by time as that power is limited by the remainder of the rule.

It is said that this exception (b) (1) contained in Rule 60 is designed to preserve the common law remedy of bills of review and bills in the nature of bills of review.

> *Fraser* v. *Doing*, 76 U. S. App. D. C. 111, 130 Fed. 2d. 617.

The notes of the Advisory Committee, Rule 60, Title 28 USCA, following § 723 (c), do not disclose that exception (b) (1) of Rule 60 was designed to preserve the remedy of bills of review and bills in the nature of bills of review to the exclusion of other remedies.

In Cyclopedia of Federal Procedure, 2d Ed., Vol. 8, § 3599, last paragraph, p. 348, is found this comment:

> "Another distinction that was usually observed in equity practice prior to adoption of the Rules of Civil Procedure was that between the application for rehearing and the bill of review. The application for rehearing was available during the term of rendition of the decree, but after expiration of the term application usually had to be by bill of review or independent suit to enjoin

> enforcement. Since, under the Rules of Civil Procedure, the term of court at which a judgment is entered no longer fixes the period of the court's primary control over the judgment, and rehearing applications are placed upon the same basis as motions for new trial, there is nothing to be gained by further pursuing distinctions, now of no moment, between rehearing applications and bills of review."

The order of December 7, 1942 was entered in a receivership proceeding in equity. The receivership proceedings are still open and consequently the orders of the district court in the proceedings, even final orders, when no intervening rights have vested on the strength of them, are subject to the continuing control of the district court until the proceedings are finally closed. The name of the remedy is now unimportant.

The Circuit Court of Appeals thought the remedy invoked was an "action." (R. 706). The prayer of the petition filed March 31, 1944 (R. 618) to review the order of December 7, 1942 was broad enough to include an action as that word is used in Rule 60 (b) (1).

Fiske v. *Buder,* 8 Cir., 125 Fed. 2d 841, 844.

Cavallo v. *Agwilines,* 2 F. R. Dec. 526.

Prior to the decision of the Circuit Court of Appeals in this proceeding, that court gave Rule 60 a construction which supports the construction of it now contended for.

Bucy v. *Nevada Construction Co.*, 9 Cir., 125 Fed. 2d 213.

Bateman v. *Donovan*, 9 Cir., 131 Fed. 2d 759.

IV

Assuming the order of December 7, 1942 was final for the purpose of appeal, nevertheless it was not circumscribed by that character of finality that removed it from any further control by the district court.

(Specification of Error No. 4, page 10, supra.)

The order of December 7, 1942 was a final order for the purposes of appeal. It stands in the same position as the companion order appealed from in the Monaghan case.

Monaghan v. *Hill*, 9 Cir., 140 Fed. 2d 31.[16]

The right of appeal from orders awarding fees as between solicitor and client, payable from funds in the hands of the receiver, was settled long ago by this court.

Trustees v. *Greenough* (1881) 105 U. S. 527, 531, 26 L. Ed. 1157.

But we submit that *Trustees* v. *Greenough* decides that the orders there entered were *pro tanto* final for the purpose of appeal and not final in a sense that as of their entry they passed from further control of the court which entered them. The applicable part of the decision (105 U. S. 531) follows:

---

[16]But compare *Heinze et al* v. *Butte Consolidated Min. Co. et al*, 9 Cir., 129 Fed. 337, 340. That case and the Monaghan case, both from the same court, are opposite.

> "The first question, however, is whether these orders do or do not amount to a final decree, upon which an appeal lies to this court. They are certainly a final determination of the particular matter arising upon the complainant's petition for allowances, and direct the payment of money out of the fund in the hands of the receiver. Though incidental to the cause, the inquiry was a collateral one, having a distinct and independent character, and received a final decision. The administration of the fund for the benefit of the bondholders may continue in the court for a long time to come, dividends being made from time to time in payment of coupons still unsatisfied. *The case is a peculiar one,* it is true; but under all the circumstances, we think that the proceeding may be regarded as so far independent as to make the decision *substantially* a final decree *for the purposes* of an appeal." (Italics supplied).

It is apparent, having regard for finality, that the case was a "peculiar one" and that peculiarity may have prompted the court to qualify the finality of the order by describing it as "substantially a final decree for the purposes of an appeal". *Trustees* v. *Greenough* stands apart from the usual legal concept of final orders or decrees.[17]

It seems logical to say that the order here, as those in *Trustees* v. *Greenough,* although substantially final for the purpose of appeal, was not inflexibly final in the respect that the district court

---

[17] *Collins* v. *Miller,* 252 U. S. 364, 40 S. Ct. 347, 64 L. Ed. 616; *Newton* v. *Consolidated Gas Co.,* 265 U. S. 78, 44 S. Ct. 481, 68 L. Ed. 909.

had no further control over it so as to relieve the order from the inequity in it before termination of the administrative proceedings where it was entered. As of the time of the entry of the order of December 7, 1942, petitioner in his Ninth Circuit was not beleagured with perilous necessity of appealing from that order.

Heinze et al v. *Butte Consolidated Min. Co., et al,* (1904) 9 Cir., 129 Fed. 337, 340.

Petitioner should not fall under the impact of penalty for failure to appeal in time from the order of December 7, 1942, by confining him to that remedy exclusively, especially in view of the familiar rule "that there can be but one final decree in a suit in equity".

John Simmons Co. v. *Grier Bros. Co.,* 258 U. S. 82, 89, 42 S. Ct. 196, 66 L. Ed. 475.

We should hesitate to assert that had petitioner been over-compensated as a result of error by similar order, that the district court, in such circumstance, could not have revised the order by requiring petitioner to refund to the receivership estate the overpayment, even after the expiration of the term or after expiration of the time for appeal. Carried to its ultimate effect, the opinion of the Circuit Court of Appeals could lead to unfortunate consequences in this character of proceedings.

Receivership proceedings in courts of equity, like proceedings in bankruptcy courts, are continuing administrative proceedings. The very nature of receivership proceedings contemplates *ex vi*

necessitate the adjournment of terms until the settlement of the receiver's final account.

> *Wallace* v. *Fiske,* 8 Cir., 80 Fed. 2d 897, 901, 911.

Here the first receiver alone filed numerous petitions upon which orders were entered between December 2, 1935 and March 31, 1937. (Report of the first receiver, R. 525-576). Had terms intervened between those dates, the consequent confusion is at once apparent.

CONCLUSION

We believe this petition for certiorari presents questions of practice in administrative proceedings in equity sufficiently important to justify the granting of a writ of certiorari to review the decision and judgment of the United States Circuit Court of Appeals for the Ninth Circuit dismissing petitioner's appeals in that court, and, accordingly, it is respectfully prayed that this Honorable Court grant the writ as prayed for in the petition.

Respectfully submitted,

LESLIE C. HARDY
Counsel for Petitioner

THOMAS W. NEALON
Pro se

APPENDIX

§ 240 (a) of the Judicial Code, as amended, 28 USCA, § 347 (a):

> (a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

Rule 59 (b) of Rules of Civil Procedure, 28 USCA, following § 723 (c):

> (b) *Time For Motion.* A motion for a new trial shall be served not later than 10 days after the entry of the judgment, except that a motion for a new trial on the ground of newly discovered evidence may be made after expiration of such period and before the expiration of the time for appeal, with leave of court obtained on notice and hearing and on a showing of due diligence.

---

§ 230, Title 28 USCA:

> § 230. *Time for making application for appeal or writ of error.* No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for

review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree. (Mar. 3, 1891, c. 517, § 11, 26 Stat. 829; Feb. 13, 1925, C. 229, § 8 (c), 43 Stat. 940).

Rule 16 of Rules of Civil Procedure, 28 USCA, following § 723 (c), providing for pre-trial procedure:

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of

counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

Rule 59 of Rules of Civil Proceedure, 28 USCA, following § 723 (c), Relating to New Trials:

(a) GROUNDS. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law, or make new findings and conclusions, and direct the entry of a new judgment.

(b) TIME FOR MOTION. A motion for a new trial shall be served not later than 10 days after the entry of the judgment, except that a motion for a new trial on the ground of newly discovered evidence may be made after the expiration of such period and before the expiration of the time for appeal,

with leave of court obtained on notice and hearing and on a showing of due diligence.

(c) TIME FOR SERVING AFFIDAVITS. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) ON INITIATIVE OF COURT. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

Rule 69 of Equity Rules, 28 USCA, following § 723 (c), Relating to Rehearing:

Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or by some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Circuit Court of Appeals or the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.

Rule 60 of Rules of Civil Procedure, 28 USCA, following § 723 (c), Relating to Relief from Judgement or Order.

(a) CLERICAL MISTAKES. Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.
(b) MISTAKE; INADVERTANCE; SURPRISE; EXCUSABLE NEGLECT. On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order or proceeding taken against him through his mistake, inadvertentance, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, U. S. C., Title 28, § 118, a judgment obtained aginst a defendant not actually personally notified.

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 343

THOMAS W. NEALON,
Petitioner,

vs.

HARRY W. HILL, as Receiver of INTERMOUNTAIN BUILDING & LOAN ASSOCIATION, a corporation,
Respondent.

Brief for the Respondent in Opposition to Petition for Writ of Certiorari

UPON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

ALEXANDER B. BAKER,
703 Luhrs Tower,
Phoenix, Arizona,
Counsel for Respondent.

LOUIS B. WHITNEY,
LORETTA SAVAGE WHITNEY,
1006 Luhrs Tower,
Phoenix, Arizona,
Of Counsel.

PARKER PRINTING COMPANY, 543 SANSOME STREET, SAN FRANCISCO

Subject Index

Page

Table of Authorities Cited

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 343

THOMAS W. NEALON,
Petitioner,

vs.

HARRY W. HILL, as Receiver of INTERMOUNTAIN BUILDING & LOAN ASSOCIATION, a corporation,
Respondent.

Brief for the Respondent in Opposition to Petition for Writ of Certiorari

UPON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINION BELOW

The District Court made its final order fixing attorney's fees and expenses and ordering payment of balance due Thomas W. Nealon on December 7th, 1942 (R. 243-248), but wrote no opinion.

The opinion of the Circuit Court of Appeals (R. 704) is reported in 149 Fed.(2) 883 (Advance Sheets).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 29th, 1945 (R. 707-708). The petition for a rehearing was filed on July 20th, 1945, and denied on July 23rd, 1945, and the mandate of the Circuit Court of Appeals was stayed to and including August 31st, 1945 (R. 708-709). The jurisdiction of this Court is sought to be invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13th, 1925 (28 U.S.C.A., Section 347).

STATEMENT OF THE CASE

The summary statement of matters involved beginning on page 3 of Petitioner's Petition for Writ of Certiorari is substantially correct as far as it goes, as is also the summary of facts in his Brief (page 15, et seq.), but respondent believes that a step by step statement will more materially aid this Court in passing on the questions presented in the petition.

On October 17th, 1937, petitioner filed in the District Court his petition for allowance of attorney's fees for legal services rendered and expenses incurred (R. 108-164).

Thereafter, one Elizabeth G. Monaghan filed in that Court her petition for allowance of attorney's fees and for expenses incurred (R. 43-108).[1]

On December 20th, 1937, a hearing was had on both petitions and at the conclusion thereof both the petitions of petitioner and Elizabeth G. Monaghan were taken under advisement (R. 593).

---

1. *Monaghan v. Hill* (9 Cir.), 140 Fed.(2d) 31.

On February 18th, 1938, the District Court made and entered its order allowing petitioner $5,000 and authorized, empowered and directed the respondent receiver to pay said sum of $5,000 and in that order retained its jurisdiction "to make and enter such other and further order in the premises as to it shall seem just and equitable" (R. 595-596).

On March 3rd, 1939, the District Court entered a further order for allowance and payment of attorney's fees for legal services rendered by petitioner, reciting the allowance of February 18th, 1938, above adverted to, and ordering an additional $2,500 allowed to appellant on account, and authorizing, empowering and directing the receiver to pay such additional sum. The District Court likewise in its order of March 3rd, 1939, retained its jurisdiction "to make such other and further order in the premises as to it may seem just and equitable" (R. 597-598).

On December 7th, 1942, the District Court entered its "Final Order Fixing Attorney's Fees and Expenses, and Ordering Payment of Balance Due to Thomas W. Nealon" (R. 243-248), in which final order there were recited the payments of $5,000 in February, 1938, and $2,500 additional in March, 1939, and fixing the total fees of both Monaghan and petitioner at $25,000, and awarding petitioner one-half of said sum, less the $7,500 theretofore paid him on account, pursuant to former orders of the District Court.

In the final order of December 7th, 1942, a further allowance of $1,330.40 was made petitioner to cover "out of pocket" expenses claimed by him (R. 247).

There was further recited in that order that between the dates of December 1st, 1935, and April 1st, 1937, petitioner received $7,344 covering salary and expenses as one of the attorneys for the former Receiver, Henry S. McCluskey (R. 246). The balance of the fee allowed petitioner, to-wit, $5,000, and the out-of-pocket expenses amounting to $1,330.40, were ordered paid by the respondent and petitioner was decreed to have a lien upon the assets of the Loan Association until such sums were paid (R. 247). It was

> "Further Ordered, Adjudged and Decreed * * * that this is a final allowance and covers all services heretofore rendered by said Thomas W. Nealon as set forth in his petition and as attorney for the former Receiver" (R. 247).

Subsequent to the entry of the final order of December 7th, 1942, and on the 10th day of December, 1942, and strictly in accordance with such final order, the respondent paid to petitioner and petitioner accepted from the respondent, $6,330.40, covering following items specified in the voucher check (R. 642), to-wit:

"Date of Invoice No.	*Items*	*Amount*	*Total*
B-202—	Final Payment in Full Settlement of Attorney Fees per Order of Court of December 7, 1942	$5,000.00	
	Expenses Allowed Per Order of Court of December 7, 1942	1,330.40	
			$6,330.40"

Said Voucher check bore the following endorsement (R. 643):

> "Endorsement
>
> Endorsement of this check acknowledges payment in full for all of the invoices listed on the voucher on the reverse side of this check.
>
> THOMAS W. NEALON"

There is no denial that petitioner cashed the voucher check referred to and accepted and retained the full benefits and fruits of the final order of December 7th, 1942, The final order was based on an *unliquidated* claim.[2]

Nothing further was heard from petitioner until March 31st, 1944, some fifteen (15) months and twenty-one (21) days after the actual receipt of the payment made by the respondent pursuant to such final order, when petitioner filed a document in the District Court entitled:

> "Petition of Thomas W. Nealon requesting this honorable Court to review and rehear final order fixing attorney's fees and expenses of Thomas W. Nealon, made and entered herein on December 7, 1942" (R. 599).

The prayer of said petition is:

> "(a) That the order of this Court entered herein on December 7, 1942, allowing and awarding to petitioner compensation and expenses in the amount therein recited, be vacated for the want of jurisdiction of this Court to render said order, and that a supplemental order be made and substituted therefor by this Court allowing and awarding to petitioner compensation in such amount as now appears from the entire record herein to be right and proper.

---

2. Emphasis ours throughout this brief unless otherwise noted.

(b) That this Court, as in the nature of a bill of review, or by an original bill in equity, review said petition filed herein by petitioner on October 15, 1937, and said order entered herein on December 7, 1942, and upon such review that this Court correct the errors of law and fact apparent in said order, and thereupon allow and award to petitioner compensation in such amount as now appears from the entire record herein to be just and proper.

(c) That this Court grant a rehearing of said order entered herein on December 7, 1942, awarding compensation to petitioner, and upon such rehearing that this Court thereupon allow and award to petitioner compensation in such amount for all services performed by petitioner as now appears from the entire record herein to be just and proper.

(d) That this Court modify and revise said order entered herein on December 7, 1942, so as to allow and award compensation to petitioner for all services performed by petitioner as now appears from the entire record herein to be just and proper (R. 618).

(e) That a day be fixed by order of this Court for the hearing of this petition and that said order provide that notice of said hearing be given to said Harry W. Hill, as such receiver.

(f) And for such other and further relief as may appear just and equitable" (R. 619).

In the meantime, and on January 21st, 1944, the Circuit Court in *Monaghan v. Hill,* 140 Fed.(2) 31, held that the $12,500 allowed Mrs. Monaghan was insufficient and that she was entitled to "such a fee as to the District Court may seem right and proper but in a sum not less than $50,000."

After the petitioner filed his petition on March 31st, 1944 (R. 599), the respondent filed his answer (R. 633), the first two defenses of which questioned the jurisdiction of the District Court, and the third defense alleged that the petition "fails to state a claim upon which relief can be granted". The fourth defense was a categorical answer to the petition (R. 633-639). The fifth, sixth and seventh defenses were directed to the payment of the money awarded by the order of December 7th, 1942, and the acceptance of such money by the petitioner (R. 639-643).

An order was made by the District Court following a pretrial conference pursuant to Rule 16 of the Federal Rules of Civil Procedure (R. 643), which order was dated June 7th, 1944.

On November 21st, 1944, petitioner filed a "Motion to Submit Petition" (R. 651), and on the 22nd day of November, 1944, respondent filed a "Motion for Order Denying Petition and Dismissing Same" (R. 653).

Briefs were filed, and on the 22nd day of November, 1944, a stipulation was entered into to submit both motions on briefs without oral argument (R. 652), and an order was made by the District Court that the motions "be and the same are hereby submitted for decision" (R. 653).

On November 22nd, 1944, the District Court, by minute entry, made the following order:

> "It is Ordered that the Receiver's Motion for an Order Denying Petition of Thomas W. Nealon requesting this Honorable Court to review and rehear final order fixing attorney's fees and expenses of Thomas W. Nealon, made and entered herein on De-

cember 7, 1942, and dismissing same be and it is granted" (R. 655-656).

On November 29th, 1944, attorneys for petitioner and respondent were present in Court, and the petitioner stated he desired the record to show that he declined to amend or plead further in the case (R. 657), whereupon the District Court entered its "Final Order Denying Petition and Dismissing Same" (R. 657-658), in which it was, among other things,

> "Ordered, Adjudged and Decreed that the petition of Thomas W. Nealon filed herein on March 31st, 1944, be denied and the same is hereby dismissed with prejudice" (R. 658).

Appeals were taken to the Circuit Court

(a) "* * * from that certain order made and filed herein on December 7, 1942, entitled: 'Final Order Fixing Attorney's Fees and Expenses, and Ordering Payment of Balance Due Thomas W. Nealon,' and entered herein on the Clerk's Docket on December 7, 1942.

(b) "* * * from that certain order made and filed herein on November 29, 1944, entitled: 'Final Order Denying Petition and Dismissing Same,' and entered herein on the Clerk's Docket on November 29, 1944" (R. 666).

The respondent moved in the Circuit Court to dismiss the appeal (R. 690), and filed a brief in support of the motion (R. 694-697). Petitioner replied to the motion. The cause was argued on the motion to dismiss and on the merits, on May 28th, 1945, and ordered submitted (R.

703). The Circuit Court entered its judgment dismissing the appeal with costs (R. 707-708), after filing its opinion (R. 704).

SUMMARY OF THE ARGUMENT

Respondent's argument will be divided into sub-heads which necessarily will cover the points argued by petitioner in support of his Specification of Errors and will likewise present respondent's reasons why certiorari should not be granted in this case. Respondent relies upon the following points in opposition to the petition for writ of certiorari filed herein:

A. A petition for rehearing or a motion for a new trial should have been filed in the District Court within the time provided by the Federal Rules of Civil Procedure in order to have extended the time for appeal from the order of December 7th, 1942; it could have no effect whatever if filed after the term of the District Court had expired, although the petition be considered on the merits.

B. An order or judgment of the District Court which adjudges that an attorney is entitled to compensation in a definite amount and allows a lien therefor on a fund in court and directs payment, is a final order and appealable although no final disposition is made of the residue of the fund.

C. Petitioner in his attempted appeal from the order of December 7th, 1942, was too late, as an appeal from such an order must be taken within three (3) months from the entry thereof.

D. The order of November 29th, 1944, is not a final decision within the meaning of Section 128(a) of the Judicial Code (28 U.S.C.A., Section 225(a)), and is not appealable.

E. Petitioner by accepting the benefits of the order of December 7th, 1942, and retaining the fee allowed thereby, waived his right to appeal therefrom.

F. A bill of review, or a bill in the nature of a bill of review, would not lie in this case in any event because appellant, having accepted the benefits of the order of December 7th, 1942, is now estopped from reviewing same; he cannot accept the benefits of the order and at the same time escape from its burdens.

G. A bill of review for errors apparent on the face of the record will not lie after the time allowed for appeal has elapsed.

ARGUMENT

FOREWORD

Petitioner relies to a great extent on three bankruptcy cases decided by this Court,[3] and urges that these cases, by reason of the proceeding taken in the District Court in the case at bar, permit an appeal to be taken after the time for appeal has elapsed. No seasonable motion for rehearing was under consideration and the term of the District Court had expired. This will be argued first and related matters in their proper order.

---

3. *Wayne United Gas Co. v. Owens-Illinois Glass Co.*, 300 U.S. 131; *Bowman v. Lopereno*, 311 U.S. 262; *Pfister v. Northern Illinois Finance Corp.*, 317 U.S. 144.

A. A petition for rehearing or a motion for a new trial should have been filed in the District Court within the time provided by the Federal Rules of Civil Procedure in order to have extended the time for appeal from the order of December 7th, 1942; it could have no effect whatever if filed after the term of the District Court had expired, although the petition be considered on the merits.

The petition or motion for a rehearing or new trial should have been filed within ten (10) days after entry of the order of December 7th, 1942. This is definitely provided for by Rule 59(b), Federal Rules of Civil Procedure, following Section 723C, Title 28, U.S.C.A. Rule 60(b) is inapplicable here because the action taken by petitioner was not within the six (6) months' period provided for by that Rule. At all events, Rule 60(b) does not affect the finality of the order of December 7th, 1942.

Safeway Stores, Inc. v. Coe, etc. et al. (C.C.A. D.C.), 136 Fed.(2) 771;
Jusino v. Morales, etc. (1 Cir.), 139 Fed.(2) 946;
4 *Cyc. Fed. Proc.* (2nd Ed.), page 310.

Petitioner urges that by the provisions of Rule 6(c)[4] terms of court in some manner have been *abolished* and cites in support of that position *Sprague v. Ticonic National Bank*, 307 U.S. 161.

The regular terms of the District Court where this case was tried begin on the first Mondays in April and Octo-

4. "6(c) *Unaffected by Expiration of Term.* The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of court. The expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it."

ber. (*Gee Lung, et al. v. United States* (9 Cir.), 111 Fed. (2) 640.) Several terms expired since the order of December 7th, 1942, was entered. Rule 6 has to with "time". Subdivision (c) of the Rule provides in effect that the period of time for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of court and that the expiration of a term of court in no way affects the power of a court to do any act or take any proceedings in any civil action which has been pending before it. This makes terms of court "anachronistic", as stated by Mr. Justice Frankfurter in *Sprague v. Ticonic National Bank, supra.* Mr. Justice Frankfurter did not say that terms of court were *abolished* by Subdivision (c) of Rule 6. He said in effect that where, under the rules, a time is set within which a proceeding must be taken in a pending action, if the term of court in the meantime expires, so long as the action is taken within the time provided by the rules, the expiration of the term of court does not affect such action. A careful reading of footnote 9 to the *Sprague* case demonstrates the soundness of this. Compare:

Safeway Stores, Inc. v. Coe, et al. (C.C.A. D.C.), 136 Fed.(2) 771, 774, 775;

National Popsicle Corporation et al. v. Hughes (D.C. Cal.), 32 Fed. Supp. 397;

Bateman v. Donovan (9 Cir.), 131 Fed.(2) 759, 764.

Respondent has cited:

Wayne United Gas Co. v. Owens-Illinois Glass Co., 300 U.S. 131;

Bowman v. Lopereno, 311 U.S. 262;

Pfister v. Northern Illinois Finance Corp., 317 U.S. 144.

These last cited cases all refer to bankruptcy matters, and this Honorable Court has repeatedly held that a court of bankruptcy sits continuously and has no terms. As stated in *Wayne United Gas Co. v. Owens-Illinois Glass Co., supra:*

> "A court of equity may grant a rehearing, and vacate, alter, or amend its decree, after an appeal has been perfected and after the time for appeal has expired, *but not after expiration of the term* at which the decree was entered. It is true the bankruptcy court applies the doctrine of equity, but the fact that *such a court has no terms,* and sits continuously, renders inapplicable, the rules with respect to the want of power in a court of equity to vacate a decree after the term at which it was entered has ended."

As stated by the Circuit Court in the case below (149 Fed.(2) 883), the petition for rehearing was filed after the time prescribed in Rule 59(b) of the Federal Rules of Procedure, 28 U.S.C.A., following 723(c) and after the expiration of the time for appealing from the order *and after the expiration of the term at which the order was entered,* and that the petition, not having been seasonably filed, the time for appealing was not enlarged and extended. This holding is eminently correct.

It is our position that this being a civil action, equitable in nature, and not a petition in a bankruptcy proceeding, *Wayne Gas Co. v. Owens-Illinois Glass Co.,* 300 U.S. 131, and the two later cases relied upon by petitioner, are not in point.

Petitioner also urges that the order relating to his services as attorney for the receiver decided a claim

that was not in issue. The Court had jurisdiction to render the order and whether it was rightfully or wrongfully entered cannot now be inquired into as the remedy was by an appeal from the order.

Allen v. Allen, et al. (9 Cir.), 97 Fed. 525, 530, 531;
Treinies, et al. v. Sunshine Mining Co., et al. (9 Cir.), 99 Fed.(2d) 651, 655;
Roche v. McDonald, 275 U.S. 449, 454;
Boundary County, Idaho, et al. v. Woldson (9 Cir.), 144 Fed.(2d) 17, 19;
Wells Fargo & Co. v. City and County of San Francisco (Calif.), 152 Pac.(2d) 625, 628.

B. An order or judgment of the District Court which adjudges that an attorney is entitled to compensation in a definite amount and allows a lien therefor on a fund in court and directs payment, is a final order and appealable although no final disposition is made of the residue of the fund.

Petitioner, in asking the District Court to review and rehear its order of December 7th, 1942 (R. 599), contended that the order was not a *final* order (R. 610, 617, 618). That position was abandoned by petitioner in the Circuit Court because that question, in view of *Monaghan v. Hill* (9 Cir.), 140 Fed.(2) 31, became academic. Petitioner here again questions the finality of the order of December 7th, 1942.[5]

Ignoring for the moment the proposition that petitioner after having accepted the benefits of the order of December 7th, 1942, could not appeal therefrom, it goes without saying that if petitioner was dissatisfied with the fee

5. See argument beginning on page 29 of the Petition for Writ of Certiorari and Supporting Brief.

allowed him by the District Court's order of December 7th, 1942, he should, in all events, have appealed within the time provided by statute, i.e., within three (3) months, inasmuch as the order entered was final. Compare:

Monaghan v. Hill (9 Cir.), 140 Fed.(2) 31;
Trustees v. Greenough, 105 U.S. 527;
Reeves v. Beardall, 316 U.S. 283;
Dexter Horton National Bank of Seattle v. Hawkins, et al. (9 Cir.), 190 Fed. 924;
Gripton v. Richardson (9 Cir.), 82 Fed.(2) 313;
Gelberg v. Richardson (9 Cir.), 82 Fed.(2) 314, 315;
Tuttle v. Claflin (2 Cir.), 88 Fed.(2) 122;
Jacksonville, T. & K. W. Ry. Company, et al. v. American Construction Company, et al. (5 Cir.), 57 Fed. 66;
Ruggles, et al. v. Patton (6 Cir.), 143 Fed. 312;
Central Trust Co. of New York v. United States Light & Heating Co., et al. (2 Cir.), 233 Fed. 420;
Sawyer v. Ellis, et al., 36 Ariz. 419, 286 Pac. 189;
Cyc. Fed. Proc. (2d Ed.), Vol. 10, page 252.

In *Cyc. Fed. Proc., supra,* it appears that:

"An order relating to attorney's fees and disbursements is appealable where a final decision, but not otherwise, as where it is in one of its substantial parts reserved for further adjudication. *A decree which adjudges that an attorney is entitled to compensation in a definite amount and allows a lien therefor on a fund in court, and directs payment, is appealable although no final disposition is made of the residue of the fund.*"

These cases are not to be confused with *Heinze v. Butte and Boston Consolidated Mining Company,* 129 Fed. 337,

and *Colley v. Wolcott,* 187 Fed. 595, and like cases. In the *Heinze* case, there was *an interlocutory order* confirming a receiver's report and directing the receiver to pay expenses incurred by him before the coming on of his final account. This was held not a final order. In the *Colley* case, an allowance was made for services of attorneys but the order provided that the allowance should be thereafter paid in such manner *as the court should direct.* This was held *not to be a final order.* Neither of these cases portray the situation in the case at bar.

Petitioner, not having appealed from the final order of the District Court within the time provided by Title 28, Section 230, U.S.C.A., the Circuit Court was without jurisdiction to do other than dismiss the appeal taken December 7th, 1944, exactly two years after the order of December 7th, 1942 (R. 666).

C. Petitioner in his attempted appeal from the order of December 7th, 1942, was too late, as an appeal from such an order must be taken within three (3) months from the entry thereof.

It appears from the record that no motion or petition for rehearing, or for other relief, was directed to the final order of December 7th, 1942, until March 31st, 1944, fifteen months and twenty-four days after the entry of the order of December 7th, 1942, and fifteen months and twenty-one days after the actual payment by the respondent receiver to the petitioner of the moneys awarded by that order. The first portion of the Notice of Appeal (R. 666) is late because taken more than three (3) months after the order of December 7th, 1942, was entered, there being no motion or petition under advisement during the

period from December 7th, 1942, to March 31st, 1944. The District Court having lost jurisdiction over its order of December 7th, 1942, the Circuit Court likewise was without jurisdiction to review that order as the same became final and the time to appeal expired three (3) months after entry of the order.

Title 28, Section 230, U.S.C.A.;
Monaghan v. Hill (9 Cir.), 140 Fed.(2) 31, 33.

If the petition had been timely, the rule would not be applicable because the order would not be final for appeal purposes.

Mitchell v. Maurer (9 Cir.), 67 Fed.(2d) 286.

D. The order of November 29th, 1944, is not a final decision within the meaning of Section 128(a) of the Judicial Code (28 U.S. C.A., Section 225(a)), and is not appealable.

The second portion of the Notice of Appeal is from the order denying and dismissing petition made and entered by the District Court on November 29th, 1944 (R. 666). The order of November 29th, 1944, is not appealable. Compare:

10 *Cyc. Fed. Proc.* (2nd Ed.), Section 4892;
Conboy v. First National Bank of Jersey City, 203 U.S. 141;
Pfister v. Northern Ilinois Finance Corp., 317 U.S. 144;
Donovan v. Jeffcott, et al. (9 Cir.), 147 Fed.(2d) 198;
Wayne United Gas Co. v. Owens-Illinois Co., 300 U.S. 131;

Cuno Corp. v. Hudson Auto Supply Co. (2 Cir.), 49 Fed.(2) 654 (second case);

Bondholders and Purchasers of the Iron Railroad v. Toledo, D. & B. R. Co. (7 Cir.), 62 Fed. 166 (certiorari denied), 166 U.S. 721.

E. Petitioner by accepting the benefits of the order of December 7th, 1942, and retaining the fee allowed thereby, waived his right to appeal therefrom.

The Circuit Court in its opinion did not directly pass upon the question of whether the petitioner, by accepting the benefits of the order of December 7th, 1942, waived his right to appeal therefrom, stating that that point need not be considered. *Nealon v. Hill* (9 Cir.), 149 Fed.(2) 883 at 885 (R. 706).

Petitioner in his Brief here suggests, that if this Court concludes that the question of waiver arising from accepting the benefits of the order should be considered and disposed of, that an opportunity be accorded him to present his position on that question by supplemental brief. Inasmuch as this question is highly important and is discussed by the Circuit Court in its opinion and was one of the main grounds invoked in the Circuit Court by the respondent in his Motion to Dismiss Appeal (R. 694, 695), respondent feels that the matter should be presented in opposition to the petition for the reason that if the Circuit Court's holding that the appeals should be dismissed was correct upon any theory, there would be no necessity to grant certiorari as the final result would be the same.

It is respondent's contention that the petitioner, *a lawyer*, with full knowledge of the facts, having voluntarily accepted from respondent the money ordered paid

in discharge of the order, could not prosecute an appeal to the Circuit Court in the hope of obtaining a more satisfactory order. In short, the settlement of the order by the respondent strictly in accordance with its terms extinguished all matters between the parties and left nothing for the decision of the Circuit Court. The question became moot and at all events petitioner, by his action, was estopped from questioning the order. *This would be applicable even if the appeal was taken within the time provided by statute* and is doubly applicable where not taken until after the expiration of the term at which the order was entered.

It is the general rule that a party cannot accept the benefits of a judgment, order or decree and afterwards prosecute an appeal or writ of error to review the same; and that he cannot, in case of interdependent provisions, accept the benefits of the part which is favorable and appeal from the part which is unfavorable; nor can he, in making such acceptance, reserve the right to appeal. In the Circuit Court the respondent urged that if what is sometimes known as the "State Law Conformity Act",[6] or the doctrine laid down by this Court in *Erie Railroad Company v. Tompkins,* 304 U.S. 64, and *Ruhlin v. New York Life Ins. Co.,* 304 U.S. 202, was applicable, then the law of the State of Arizona would foreclose petitioner's attempted appeal to the Circuit Court.

If the Arizona law is to be followed, petitioner could

---

6. Section 725, Title 28, U.S.C.A., reads: "The laws of the several states, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

not successfully appeal to the Circuit Court after having accepted the fruits of the order of December 7th, 1942. See:

Shannon Copper Co. v. Potter, 14 Ariz. 481; 131 Pac. 157;

Brown v. Kester, 39 Ariz. 545, 8 Pac.(2) 453;

Frankel v. Frankel, 41 Ariz. 396, 18 Pac.(2) 911.

Intermountain Building & Loan Association, of which respondent is receiver, is a Utah corporation. Under the law of Utah, an appeal, under the circumstances here present, would not lie. See:

Sierra Nevada Mill Co. v. Keith O'Brien Co., 48 Utah 12, 156 Pac. 943, 946, 947;

Ottenheimer, et al. v. Mountain States Supply Co., 56 Utah 190, 188 Pac. 1117, 1118;

Moon v. Bollwinkle, et al., 47 Utah 389, 154 Pac. 939, 940.

Under the general law an appeal would not lie. Compare:

U. S., et al. v. Benedict, 261 U.S. 294;

Singer Mfg. Co. v. Wright, 141 U.S. 696;

Little v. Bowers, 134 U.S. 547;

Smith v. Morris, et al. (3 Cir.), 69 Fed.(2) 3;

Kaiser v. Standard Oil Co. of New Jersey (5 Cir.), 89 Fed.(2) 58;

Albright, et al. v. Oyster, et al. (8 Cir.), 60 Fed. 644;

Oriole Phonograph Co. v. Kansas City, etc. (8 Cir.), 34 Fed.(2) 400, 401;

Denney v. Fort Recovery Banking Company (7 Cir.), 135 Fed.(2) 184, 186;

Altman v. Shopping Center Bldg., et al. (8 Cir.), 82 Fed.(2) 521 at 527;

Re Greenpoint Metallic Bed Co., Inc. (2 Cir.), 113 Fed.(2) 881, 884;

4 *C. J. S.*, "Appeal and Error", Paragraphs 215, 216, page 414;

2 *Am. Jur.*, Paragraph 214, page 975 (and see on page 977);

10 *Cyc. Fed. Proc.* (2nd Ed.), page 503.

Smith v. Morris, supra (69 Fed.(2) 3), is directly in point:

> "We pass by that question (Stuart v. Boulware, 133 U.S. 78, 10 S.Ct. 242, 33 L.Ed. 568) and come to one *which is not debatable.* That question arises on the receivers' motion to dismiss the appeal and may be stated thus:
>
> "If there is in any case a right of appeal in a matter of fees, whether Mr. Smith has waived that right by accepting and retaining the fee allowed him by the order appealed from?
>
> "Actually, Mr. Smith is appealing from the whole order. Although it contains two paragraphs, one denying the allowance of joint fees, the other allowing Mr. Smith a separate fee, it is but one order, the two paragraphs being related and consistent one with the other. Mr. Smith is endeavoring to appeal from that part of the order which denied his contention that he is a joint solicitor with Richards, Layton and Finger, and, accordingly, denied him an allowance as such, while at the same time he is retaining the benefits of the order by which he, separately, was allowed, and paid, $5,000, with the allowance distinctly marked 'as full and final compensation for his services.' In

doing this, he is confronted by a rule of law, than which none is better settled, that one 'who accepts the benefits or any substantial part of the benefits of a judgment or decree is thereby estopped from reviewing and escaping from its burdens.' He cannot avail himself of its advantages, and then question its disadvantages in a higher court. (Citing cases.)"

If the Circuit Court had considered the point here presented, it would have rightfully dismissed the appeal on the record no matter whether it considered (1) the law of Arizona; (2) the law of Utah; or (3) the general law, as being applicable.

F. A bill of review, or a bill in the nature of a bill of review, would not lie in this case in any event because appellant, having accepted the benefits of the order of December 7th, 1942, is now estopped from reviewing same; he cannot accept the benefits of the order and at the same time escape from its burdens.

A bill of review, or a bill in the nature of a bill of review, would not lie by the same token that an appeal would not lie, because petitioner accepted the fruits of the order of December 7th, 1942. In support of this proposition, respondent cites:

Hill, et al. v. Phelps, et al. (8 Cir.), 101 Fed. 650;

Home St. Ry. Co., et al. v. City of Lincoln (8 Cir.), 162 Fed. 133;

Albright, et al. v. Oyster, et al. (8 Cir.), 60 Fed. 644;

Chase v. Driver, 92 Fed. 780, 786;

Brigham City v. Toltec Ranch Co., 101 Fed. 85;

Central Hanover Bank, et al. v. Wardman, etc., 31 Fed. Supp. 685, 688 (citing *Hill v. Phelps*, supra).

G. A bill of review for errors apparent on the face of the record will not lie after the time allowed for appeal has elapsed.

The Circuit Court in its opinion in the instant case held that the petition filed in the District Court by petitioner on March 31st, 1944, was not, and did not purport to be, a bill of review, or a bill in the nature of a bill of review, citing *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (R. 705). The Circuit Court stated that the petition was merely a petition for rehearing.

There is no claim by petitioner that there was any fraud in the order nor is any newly discovered evidence claimed. If it could be considered that this is a bill of review for errors apparent on the face of the record, such a bill would not lie after the time allowed for appeal has elapsed. See:

Thomas v. Brockenbraugh, et al., 23 U.S. 146, 150;

Central Trust Co. v. The Grant Locomotive Works, etc., 135 U.S. 207, 227;

Peeke v. Citizens Bank Company etc. (6 Cir.), 81 Fed.(2) 112;

Jorgenson v. Young (9 Cir.), 136 Fed. 378;

Reed, et al. v. Stanley, et al. (9 Cir.), 97 Fed. 521;

Farmers & Merchants Bank v. Arizona M. & L. Ass'n (9 Cir.), 220 Fed. 1, 7;

Hagerott v. Adams (8 Cir.), 61 Fed.(2) 35, 36;

Blythe Co. v. Hinckley, et al. (9 Cir.), 111 Fed. 827, 837, 841;

Hendryx, et al. v. Perkins (1 Cir.), 114 Fed. 801, 804;

Chamberlin v. Peoria etc. (7 Cir.), 118 Fed. 32, 34;

Cocke, et al. v. Copenhaven, et al. (4 Cir.), 126 Fed. 145, 147;

In re Holmes, 142 Fed. 391, 393, 394;
In re Stearns & White Co., 295 Fed. 833, 839, 840;
Taylor v. Easton, 180 Fed. 363;
Home St. Ry., et al. v. City of Lincoln (8 Cir.), 162 Fed. 133;
19 *Am. Jur.,* Sec. 444, page 306;
Cyc. Fed. Proc. (2d Ed.), Vol. 8, Sec. 3602, pages 350, 351.

CONCLUSION

In his petition for writ of certiorari (page 11), petitioner states that the Circuit Court of Appeals by dismissing his appeal has erroneously decided an important question of Federal practice, which has not been settled by this Court, and that it has decided a question of Federal practice pertaining to a receivership proceeding in equity not closed in a way probably in conflict with applicable decisions of this Court. The only cases from this Court cited by petitioner are *Wayne United Gas Co. v. Owens-Illinois Glass Co., Bowman v. Lopereno,* and *Pfister v. Northern Illinois Finance Co.,* which respondent believes he has shown are not applicable here, because the instant case sought to be reviewed is not a bankruptcy proceeding in any sense of the word.

The other case from this Court relied upon for the purpose of showing apparently that terms of court have been abolished is *Sprague v. Ticonic National Bank.* There is no question but that petitioner has misinterpreted the holding in that case.

Bateman v. Donovan (9 Cir.), 131 Fed.(2) 759, and *Bucy v. Nevada Const. Co.* (9 Cir.), 125 Fed.(2) 213, do

not in any way conflict with *Nealon v. Hill*, 149 Fed.(2) 883, which the petitioner seeks to have this Court review.

We believe that the granting of certiorari in this case would in the end not settle any question that has not already been settled by this Court and that even if the writ were granted, in view of the other points not passed upon by the Circuit Court, particularly the acceptance of the fruits of the order of December 7th, 1942, by the petitioner, the result would be the same, i.e., dismissal of the appeal by the Circuit Court.

Respectfully submitted,

ALEXANDER B. BAKER,
Counsel for Respondent.

LOUIS B. WHITNEY,
LORETTA SAVAGE WHITNEY,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 343

THOMAS W. NEALON,
Petitioner,

vs.

HARRY W. HILL, as Receiver of Intermountain Building & Loan Association, a corporation,
Respondent.

Brief of Petitioner in Reply to Brief of Respondent

LESLIE C. HARDY,
Luhrs Tower,
Phoenix, Arizona,
Counsel for Petitioner.

THOMAS W. NEALON,
Luhrs Tower,
Phoenix, Arizona,
Pro Se.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

Table of Authorities Cited

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 343

THOMAS W. NEALON,

Petitioner,

vs.

HARRY W. HILL, as Receiver of Intermountain Building & Loan Association, a corporation,

Respondent.

Brief of Petitioner in Reply to Brief of Respondent

Petitioner and his counsel regret that they are compelled to burden this court with a reply to the brief for the respondent filed in opposition to the petition for writ of certiorari. Inaccuracy of statement and discussion of extraneous matters found in respondent's brief in opposition prompts this reply.

I.

On page 11 of the brief of respondent it is incorrectly asserted as follows:

> "Petitioner urges that by the provisions of Rule 6(c) terms of court in some manner have been *abolished* and cites in support of that position *Sprague v. Ticonic National Bank,* 307 U.S. 161."

The same assertion is made on pages 12 and 24 of respondent's brief.

Petitioner does not assert that Rule 6(c) of the Rules of Federal Procedure has abolished terms of court. Such an assertion is not found in petitioner's brief in support of the petition for certiorari, and, if made, would be absurd. This question is discussed at pages 24 to 26, inclusive, of petitioner's brief. Petitioner there asserted, and now asserts, that since the adoption of Rule 6(c), the expiration of the term of the district court, *in this receivership proceedings in equity not closed,* in no way affected the power of that court to review the order of December 7, 1942 (R. 243) by the petition filed March 31, 1944 (R. 599). Rule 6(c) expressly conferred that power upon the district court, after term had expired, and the district court, having entertained the petition of March 31, 1944, to review the order of December 7, 1942, placed the latter order in position for review by appeal to the Circuit Court of Appeals. Consequently, the order of December 7, 1942, in equity, stood in the same position as the orders, in bankruptcy, which were reviewed by this court in the following decisions:

Wayne United Gas Co. v. Owens-Illinois Glass Co., 300 U.S. 131, 81 L.Ed. 557, 57 S.Ct. 382;

Bowman v. Lopereno, 311 U.S. 262, 85 L.Ed. 177, 61 S.Ct. 201;

Pfister v. Northern Illinois Finance Co., 317 U.S. 144, 87 L.Ed. 146, 63 S.Ct. 133.

Therefore, petitioner contends, not that Rule 6(c) abolished terms of court, but that the rule, when applied to this receivership proceedings in equity not closed, subjected the orders now involved, both in the Circuit Court of Appeals, and in this Court, to the rule of decision applicable to bankruptcy proceedings, as illustrated by the decisions of this court last cited, because the rule of practice announced in those decisions was drawn from equity and not from bankruptcy, and consequently, since terms of court in receivership proceedings in equity are now anachronistic, orders in receivership proceedings in equity stand like orders in proceedings in bankruptcy.

II.

Respondent, on pages 18 to 22, inclusive, of the brief in opposition asserts that petitioner, by accepting the benefits of the order of December 7, 1942, waived his right to appeal therefrom.

The question is not now involved and only serves to confuse the issue. But since respondent has raised the question petitioner thinks he is justified in discussing it.

In this respect the Circuit Court of Appeals said:

> "Whether the appellant, by accepting the benefits of the order of December 7, 1942, waived his right to appeal therefrom, need not be considered." (R. 706)

Notwithstanding this disposition of the question by the Circuit Court of Appeals in its relationship to this petition for writ of certiorari which is predicated upon procedural questions only, respondent asserts in his brief in opposition (p. 18) as follows:

> "* * * Inasmuch as this question is highly important and is discussed by the Circuit Court in its opinion * * * respondent feels that the matter should be presented in opposition to the petition * * *."

The question is highly important but it was not discussed by the Circuit Court of Appeals as petitioner asserts, but, on the other hand, was summarily dismissed by that court. The question did not enter into either its decision or judgment.

Confusing statements of this kind are not helpful to a correct disposition of this petition for certiorari which is invoked to settle important questions of practice arising from a correct construction of some of the Rules of Federal Procedure.

The voucher check which respondent, as receiver, tendered to petitioner under the order of December 7, 1942, is set forth in restricted form in the opinion of the Circuit Court of Appeals (R. 705). It is set forth in complete detail on pages 4 and 5 of the brief of respondent in opposition.

The check tendered was for the sum of $6,330.40. Of that amount $1,330.40 represented expenses *paid out and incurred by petitioner* as counsel for the petitioning creditors in the creditors' suit. The receiver did not tender to petitioner checks for separate amounts, that is the amount allowed as a fee by the district court, and the amount

allowed as expenses, but, on the other hand, the check tendered to petitioner required him to accept the check as written in order to reimburse himself for the expenses which he had incurred.

The order of December 7, 1942, recited that the award made to petitioner constituted "total compensation fixed and allowed for all services rendered by petitioner" (R. 246). The order further recited "that this is a final allowance and covers all services heretofore rendered by Thomas W. Nealon, as set forth in said petition, and as attorney for the former receiver" (R. 247). The petition filed October 15, 1937, by petitioner was limited to compensation for solicitor's fees in the creditors' suit (R. 160-161). Petitioner did not then claim compensation for services he had performed as solicitor for the receiver and in the ancillary receiverships. Petitioner, for the first time, claimed compensation for such services by the petition filed March 31, 1944 (R. 599). That petition was supported by petitioner's affidavit (R. 620). Petitioner then claimed the reasonable value of those services in the amount of $40,500.00 (R. 631). The claim was then before the district court for the first time.

The petition for solicitor's fees in the creditors' suit was not contradicted or contested by the respondent, as receiver. Experienced attorneys testified that the value of petitioner's services in the creditors' suit alone ranged from $100,000.00 to $200,000.00. *Monaghan v. Hill,* 9 Cir., 140 Fed.2d 31, 33. This testimony was not contradicted by respondent as receiver. In *Monaghan v. Hill,* page 34, the Circuit Court of Appeals said:

> "In the instant case the judge who fixed the fees assumed the federal bench after the services for which

compensation is claimed were rendered and is in no better position to judge the reasonable value of the work performed than are the judges of this court who have heard the argument and who have studied the record."

Measured by the character of check which the receiver tendered petitioner; the uncontradicted testimony of experienced attorneys as to the value of petitioner's services in the creditors' suit; the decision of the Circuit Court of Appeals in *Monaghan v. Hill,* 141 Fed.2d 31; the continuing control a district court exercises over its orders in a receivership proceedings in equity not closed; the affidavit of petitioner in support of his petition filed March 31, 1944, whereby petitioner estimated the reasonable value of his services on behalf of the first receiver, and in the ancillary receiverships, in the amount of $40,500.00, conjoined with the fact that petitioner has not been accorded an opportunity to be heard upon the extent and value of those services, petitioner believes he can assert successfully that under the circumstances appearing here, the acceptance of the check which was tendered to him by respondent, as receiver, did not constitute a waiver of his right to appeal from the order of December 7, 1942.

In all events, petitioner was entitled to more than he received under the order of December 7, 1942. Consequently, the acceptance by petitioner of that which he confessedly was entitled to receive, does not estop him from claiming that which is justly due, nor waive his right to appeal, as is exemplified by the following decisions of this court:

Embry v. Palmer, 107 U.S. 3, 2 S.Ct. 25, 27 L.Ed. 346, citing *United States v. Dashiel*, 3 Wall. 688;
Reynes v. Dumont, 130 U.S. 354, 9 S.Ct. 486, 32 L.Ed. 934;
Erwin v. Lowry, 7 How. (48 U.S.) 172, 184, 12 L.Ed. 655.

The order of December 7, 1942, foreclosing petitioner the opportunity to be heard upon services rendered to the receiver first appointed, and in the ancillary receiverships, was beyond the jurisdiction of the district court to render because the question was not before the district court.

Petitioner has not been accorded the opportunity to be heard upon his right and claim of compensation for those services.

In *Standard Oil Co. v. Missouri ex rel. Hadley*, 224 U.S. 270, 32 S.Ct. 406, 56 L.Ed. 760, this court said:

> "For even if a court has original general jurisdiction, criminal and civil, at law and in equity, it cannot enter a judgment which is beyond the claim asserted, or which, in its essential character, is not responsive to the cause of action upon which the proceeding was based. * * *"

III.

On pages 18 and 19 of respondent's brief in opposition respondent asserts that petitioner, by accepting the benefits of the order of December 7, 1942, has waived his right to appeal from that order and invokes decisions of the

Supreme Courts of Arizona and Utah which respondent argues controls the question here under

Erie Railroad Company v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188;

Ruhlin v. New York Life Ins. Co., 304 U.S. 202, 58 S.Ct. 860, 82 L.Ed. 1290.

Again the respondent's argument is extraneous to the issue now involved, measured by the limitation of the decision of the Circuit Court of Appeals, but in all events the argument is wholly misfounded.

Erie Railroad Company v. Tompkins, and the decisions of this court which follow, limit the rule there announced to diversity cases. Here the controversy is between petitioner as a solicitor, and respondent, as a receiver, initiated in a suit in equity then pending in the District Court of Arizona. The jurisdiction of the district court to entertain the petitions which the petitioner filed, and which are now under review, was not invoked because of diversity of citizenship as between petitioner and respondent.

Erie Railroad Company v. Tompkins, and similar cases, are not designed to abdicate the jurisdiction and power of federal courts to control proceedings and orders in receiverships in equity.

Federal courts in proceedings in equity apply the substantive law of the state only as it may be correlated with equitable remedies, in the application of which federal courts are uncontrolled.

Dodge v. Tulleys, 144 U.S. 451, 456, 457, 12 S.Ct. 728, 36 L.Ed. 501.

IV.

Estoppel or waiver arising from the acceptance of the benefit of a judgment, decree or order in a receivership proceeding in equity do not fall under the legal concept of the effect of a final judgment in an action at law or a final decree in a suit in equity.

The words of condition written by the receiver into the check which petitioner accepted cannot impair the legal effect of the order of December 2, 1942, under which the check was written, nor can they deprive the district court of its continuing power to review the order under which the check was delivered and accepted. The receiver is an arm of the court. Consequently, in the present case he stands not in the relationship of judgment debtor in the sense that he may invoke that relationship against petitioner as a judgment creditor.

The receiver is an officer of the district court which appointed him, and property which has come into his hands in the receivership proceedings is not, in a legal sense, in the receiver's possession, but is in the possession of the court by him as its officer.

> *Taylor v. Sternberg,* 293 U.S. 470, 55 S.Ct. 260, 79 L.Ed. 599.

Thus the receiver cannot, by any act upon his part, deprive the district court of power to control and revise its orders before the final termination of the receivership proceedings.

We continue to think that important questions of practice are involved which authorize the efforts of petitioner to have the decision and judgment of the Circuit Court of Appeals reviewed, especially in this receivership proceed-

ings in equity which has not passed to a final termination, in order that the allowance which has been made to petitioner may be reviewed either by the Circuit Court of Appeals or by this Honorable Court.

Respectfully submitted,

LESLIE C. HARDY,
Counsel for Petitioner.

THOMAS W. NEALON,
Pro Se.

Due service and receipt of a copy of the within is hereby admitted this.....day of September, 1945.

_____

Attorney for Respondent